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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 814

PAUL W. SAMPSELL, as Trustee in Bankruptcy for the Estate of New Wells Market, a copartnership consisting of Shoo Hoo Kim Ying, *et al.*,

Petitioner,

vs.

SUN H. TOM,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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IN THE

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OCTOBER TERM, 1942.

No.....

PAUL W. SAMPSELL, as Trustee in Bankruptcy for the Estate of New Wells Market, a copartnership consisting of Shoo Hoo Kim Ying, *et al.*,

Petitioner,

vs.

SUN H. TOM,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

This is a petition for writ of certiorari to the Ninth Circuit Court of Appeals brought before this court under the provisions of Section 24-c of the National Bankruptcy Act (11 U. S. C. A., Section 47-c, and Section 240 of the Judicial Code (28 U. S. C. A., Section 347).

The jurisdiction of the District Court was invoked under the provisions of Sections 60-b and 67-d of the National Bankruptcy Act (11 U. S. C. A., Sections 97-b and 107-d), for the purpose of avoiding a preferential and

fraudulent transfer of the assets of a bankrupt copartnership.

The jurisdiction of the United States Circuit Court of Appeals was invoked under the provisions of Section 24-a of the National Bankruptcy Act (11 U. S. C. A., Section 47-a).

The judgment and decree of the District Court was entered on March 31, 1942. [Tr. p. 38.] The order of the Circuit Court of Appeals reversing the order of the District Court was entered on November 30, 1942.

A petition for rehearing was filed and was denied by the Circuit Court of Appeals on December 17, 1942.

The Opinion of the Appellate Court will be found in 131 Fed. (2d) 779, and in the Transcript of Record at page 276.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit, Requiring It to Certify to the Supreme Court of the United States for Its Revision and Determination the Appeal Taken by the Appellant, Sun H. Tom, Against Petitioner Lately Pending in Said Circuit Court of Appeals.

To the Honorable Harlan F. Stone, Chief Justice, and to the Associate Justices of the Supreme Court of the United States:

The petition of Paul W. Sampsell, as Trustee in Bankruptcy for the estate of the New Wells Market, a copartnership consisting of Shoo Hoo Kim Ying, *et al.*, Bankrupt, filed by virtue of the provisions of Section 24-c of the National Bankruptcy Act (11 U. S. C. A., Section 47-c), respectfully represents as follows:

First: That this cause involves a question of far-reaching importance to mercantile and business interests of the country, on which the Circuit Courts of Appeals are at variance, and involves a unique construction of the partnership provisions of the National Bankruptcy Act by the United States Circuit Court of Appeals for the Ninth Circuit, thus necessitating an authoritative determination thereupon by this court.

Second: The questions involved are as follows:

First: In an action brought by a trustee in bankruptcy for a copartnership consisting of eleven copartners to avoid a flagrantly fraudulent and preferential transfer of the bankrupt's assets, or a substantial part thereof,

made on the eve of the bankruptcy of said copartnership for the benefit of certain members of the copartnership and certain employees who were thoroughly familiar with the financial condition of the partnership business, is it necessary that the trustee before he is entitled to recover, demonstrate more conclusively to the trial court that none of the eleven copartners has assets available for the payment of the partnership debts where it is clearly established that some of the partners are in Midway Island, in the war zone, in China, in bankruptcy, and the whereabouts of many of them are unknown, in the face of the fact that the trustee obtained an order, after service by publication and otherwise, marshalling the assets of the eleven partners into the bankruptcy proceeding, but was unable to recover any assets under such order?

Second: Is a trustee in bankruptcy of a copartnership, in time of war, when certain members of said copartnership are either in invaded foreign countries or are in the war zone outside the territorial limits of the United States, required to pursue, examine, or bring before the court, such partners for the purpose of having them testify as to whether or not they have any individual assets, on the unfounded assumption that they *might* be possessed of sufficient assets to pay the liabilities of the copartnership in full, in an action brought by the trustee to avoid a fraudulent conveyance or preference by the bankrupt of the bankrupt copartnership's property?

That the proceedings had in the courts below in brief were as follows:

The New Wells Market, the bankrupt copartnership, was a copartnership operating under a fictitious name. The partnership was composed of eleven Chinamen named Chum Jom, Paul Dare, Fred Chaeng, George Lee, Thomas

Wong, Cluck Fook Quon, Tony Chew Kee, Chan Pong, Jang Lun Quong, Luke C. Kong and Shoo Hoo Kim Ying. [Plaintiff's Complaint, Tr. p. 2; Answer of Sun H. Tom admitting said allegation, Tr. p. 11.]

An involuntary petition in bankruptcy was filed on July 10, 1941, against this partnership and on July 16, 1941, an Order of Adjudication was entered. Petitioner on certiorari was elected trustee on July 29, 1941, and thereafter qualified. [Allegation II, Plaintiff's Complaint, Tr. pp. 2 and 3, and Answer of Defendant, Sun H. Tom, Tr. p. 11, admitting same.]

The bankrupt copartnership operated a store or market in the City of Los Angeles, and Shoo Hoo Kim Ying, one of the partners, was one of the managers of the partnership business. [Tr. p. 90.]

York K. Poon, one of the defendants who did not appeal from the judgment against him, was likewise a manager of the business and signed all promissory notes given by the partnership. [Defendant Tom's Exhibit "A," Tr. pp. 73 and 74.] All checks of the bankrupt were likewise signed by Shoo Hoo Kim Ying and York K. Poon. [Tr. p. 90.]

The defendant and respondent here, Sun H. Tom, was the bookkeeper for the copartnership. [Tr. p. 95.]

In the winter of 1940, a fire in the bankrupt's place of business burned all of the books and records up to January 1, 1941, or shortly before that. [Tr. pp. 95, 96.]

A new set of books was thereupon set up. [Tr. p. 96.] On July 10, 1941, an involuntary petition in bankruptcy was filed against the New Wells Market following an assignment for the benefit of creditors which had been made on July 5, 1941.

The defendant, York K. Poon, had been a partner in this large copartnership up to 1938 [Tr. p. 107], and Sun H. Tom, respondent here, had been the bookkeeper for the four or five years preceding the filing of the petition in bankruptcy. [Tr. p. 108.]

Sun H. Tom also occupied the status of a money lender to the bankrupt copartnership while acting as its bookkeeper. Over a long period of time preceding the assignment for the benefit of creditors and the adjudication in bankruptcy, Sun H. Tom had made numerous loans to the bankrupt evidenced by promissory notes executed on behalf of the partnership by Shoo Hoo Kim Ying, the managing partner, and York K. Poon, as manager. [Tr. pp. 73, 74.] These notes were demand notes carrying with them in lieu of interest a purported bonus amounting to approximately 25% of the principal, said bonus payable in some instances three years after the date of the promissory note, and in some instances five years thereafter regardless of when the principal was repaid. These notes amounted to a total of $66,160.00 advanced, and $60,-941.00 repaid, leaving a balance of $5,219.00 owing to defendant, Sun H. Tom. [Defendant Tom's Exhibit "C," Tr. p. 76.] The books of the copartnership as kept by the defendant, Sun H. Tom, however, showed at the close of business, July 5, 1941, a balance in Sun H. Tom's favor amounting to $27,059.00. [Plaintiff's Exhibit No. 8, Tr. p. 65; admitted in evidence, Tr. p. 247.]

On July 5, 1941, the date of the transaction which the trial court found constituted both a preference and a fraud, the bankrupt copartnership was in serious difficulties. Sun H. Tom had discontinued loaning it money even at the 25% bonus which the copartnership had been required to pay him. On April 12, 1941, he made his

last loan amounting to $6,000.00 which boosted his credit balance on the partnership books up to $37,980.00. Seven days later, on April 19th, he began to rapidly liquidate the loan reducing it on the books between April 19th and July 5th to $27,059.00. [Plaintiff's Exhibit No. 8, Tr. pp. 65, 66.] The bank account of the copartnership had been repeatedly overdrawn, the company running a continuous overdraft at the bank from and after April 12, 1941. [Tr. pp. 141, 143; Plaintiff's Exhibit No. 5, Tr. pp. 48, 49.]

It will be noted from an examination of Exhibit No. 5 that the overdraft at the bank reached an all time high in the month of June, amounting to $8,487.69 on one day of that month.

During this period, it will be noted from Plaintiff's Exhibit No. 8 [Tr. p. 66], Sun H. Tom was rapidly collecting back his money.

To make the situation even more crucial, a meeting of creditors was called on July 5, 1941, which was attended by York K. Poon, the manager, and Shoo Hoo Kim Ying. They were informed at that meeting that the store was going to be closed the next day. [Tr. pp. 98, 99.] The partnership had theretofore been placed on a C. O. D. basis by creditors. [Tr. pp. 101, 102.]

Friday, July 5, 1941, was collection day and a large sum of money was on hand at the time that Shoo Hoo Kim Ying informed the defendants that there was going to be a receiver put in charge of the bankrupt copartnership's business. [Tr. p. 103.] The time anticipated for the receivership was Monday, July 7th. Shoo Hoo Kim Ying had been unable to collect some of the accounts receivable because customers of the copartnership refused to pay in view of the impending receivership. [Tr. p.

104.] A conference was held on the evening of July 5, 1941, which resulted in the disbursal of funds on hand amounting to the total of $4,396.34 [see stipulation as to amount of judgment, Tr. p. 35], to Sun H. Tom $1,505.64, York K. Poon $1,503.99, Shoo Hoo Kim Ying, a partner, $260.43, Wallace Cheung, an employee, $515.25, Paul Dare, a partner, $379.03, Jung Lun Quong, a partner, $118.50, and Luke C. Kong, a partner, $113.50, or a total of $4,396.34. [See Findings of Fact, Tr. pp. 32, 33.]

No dispute exists as to the amount of preference or fraudulent conveyance involved. The judgment of the District Court was reversed solely on the ground that the Trustee had failed to prove insolvency on July 5, 1941, and in this respect we contend that the Circuit Court of Appeals was in error.

Your petitioner annexes hereto his brief in support of his petition.

Wherefore, your petitioner prays that a writ of certiorari may be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record in all proceedings in said Circuit Court of Appeals in this case therein entitled Sun H. Tom, Appellant, vs. Paul W. Sampsell, as Trustee in Bankruptcy of the Estate of New Wells Market, a copartnership consisting of Shoo Hoo Kim Ying, *et al.*, Appellee, on petition of Sun H. Tom for review, No. 10180, to the end that said case may

be reviewed and determined by this court, as provided by law; and that the judgment of the said Circuit Court of Appeals in said case may be reversed by this Honorable Court and the judgment of the District Court affirmed.

And that petitioner may have such other and further relief as may seem meet and proper.

And your petitioner will ever pray.

PAUL W. SAMPSELL,
As Trustee in Bankruptcy for the Estate of New Wells Market, Bankrupt, Petitioner.

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FRANK C. WELLER,
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Los Angeles, California,
Of Counsel.

United States of America, Southern District of California,
Central Division, County of Los Angeles—ss.

Paul W. Sampsell, being by me first duly sworn, deposes and says: That he is the Trustee in Bankruptcy and Petitioner in the above entitled action; that he has read the foregoing Petition for Writ of Certiorari and knows the contents thereof; that the same is true of his own knowledge except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes is to be true.

PAUL W. SAMPSELL.

Subscribed and sworn to before me this 3rd day of March, 1943.

BESS A. ALDRICH,
Notary Public in and for the County of Los Angeles, State of California.

Certificate of Counsel.

I, Thomas S. Tobin, a member of the bar of this court, hereby certify that I believe the foregoing Petition for Writ of Certiorari is well founded and meritorious, and is not interposed for the purpose of delay.

THOMAS S. TOBIN.